
(1924) 11 MAD CK 0028
In the Madras High Court

Doraisami Mudaliar and Thangavelu Mudaliar and Co. APPELLANT
Vs
M. Doraiswami Iyengar and Others RESPONDENT

Date of Decision : 13-11-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 130

Citation : AIR 1925 Mad 753

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—The facts of this Second Appeal may be briefly stated. The 2nd defendant is a contractor who entered into a building

contract in respect of the Vellore Municipal Hospital works with the P.W. Department. By September 1914 a sum of Rs. 2,156-8-1 was due to

him. At that time he owed Rs. 1,600 to the 3rd defendant. When the 3rd defendant demanded the payment of his debts, he executed certain letters

intending (I, assume this in favour of 3rd defendant) to transfer Rs. 1,600 out of the amount due to him from the P.W.D. In December, 1914, he

owed Rs. 6,750 - to the plaintiffs and intending to transfer the whole of this said amount, he executed similar letters. The documents that came into

existence in September and December respectively may be shown in a tabular form as follows:

From the table below, it is seen that on; each occasion, the scheme was the same, consisting of (1) a letter from assignor to assignee as an

instrument of transfer (2)

3rd Defendant Plaintiffs

dated 22-9-14 dated 10-12-14

2nd Defendant to assignee. Latter not Exhibit C.

exhibited

2nd Defendant to the Ex-

ecutive Engineer I "" E.

Assignee To Executive

Engineer III "" D.

Reply by Executive

Engineer to Assignee II Endorsement on

D.

a letter from assignor to Executive Engineer being the notice intended by Section 130 of the Transfer of Property Act. The letter of transfer to the

3rd defendant though referred to in Exhibit III is not forthcoming. It is not admitted to be unstamped (D.W. 1.) and no secondary evidence can be

given of its contents : Rajah of Bobbili v. Inuganti China Sitaramaswami Guru (1900) 23 Mad. 40. In the written statement of 3rd defendant, it was

"alleged (paras 3 and 5 ""When the second defendant was demanded payment, he gave this defendant a letter of authority asking him to draw Rs.

1,600 from the amount due to him for the Pentland Hospital works and also he sent a letter to the Executive Engineer, North Arcot, asking him to

pay the said amount to this defendant. This was on or about the 22nd September 1914. The alleged assignment referred to in para 4 of the plaint is

a fraud and not sustainable in law when the second defendant had already gives latter of assignment to this defendant to draw the amount, referred

to in para 3 of this statement."" It is therefore clear that the only assignment to the 3rd defendant pleaded by him is the letter addressed to him of

which no secondary evidence can be given. As the assignment to 3rd defendant cannot be proved, it follows that there is no assignment in his

favour and the appeal must fail on this ground. Mr. Anantakrishna Iyer contends that, apart from the assignment intended by the missing letter,

Exhibit I only is enough to prove an assignment. In the first place, this is opposed to the pleadings in which the letter of 29-9-1914 other than

Exhibit I was described as the letter of assignment and the plea cannot be allowed to be raised. In the second place, to allow the plea to be raised

is an evasion of Section 91 of the Evidence Act and of the Stamp Law and the

principle of ruling in *Rajah of Bobbili v. Inuganti China*

Sitaramaswami Guru (1900) 23 Mad. 40. A perusal of Exhibits I and III only or of even I alone leaves in one's mind the impression that something

like a transfer was intended. It is so easy to infer the transfer but to allow such an inference to be made and to give effect to it is to allow secondary

evidence of the letter of assignment to be given.

2. For the sake of argument, I will leave these two considerations aside and consider the question whether Exhibit I by itself amounts to an

assignment. In my opinion, if the matter is dealt with, apart from the English decisions to be considered lower down, it does not. There must be

words of transfer in the instrument. A notice to the debtor not containing words of transfer nor referring to a transfer is not an instrument of

transfer. Otherwise every order of payment is a transfer. Every cheque or bill of exchange is a transfer. In the first place one would expect that an

instrument of transfer should, in general, be an instrument executed in favour of the assignee. I say "in general", for there is the well recognised

exception of a transfer effected by an endorsement on the bond or other paper evidencing the debt sought to be transferred. The case in *Rama*

Iyer v. Venkatachellam Pattar [1907] 30 Mad. 75 is an example. So also is the decision in *Harding v. Harding* [1886] 17 Q.B.D. 442. In civilised

communities, such an endorsement ordering the debtor to pay, has been always considered as a transfer, an idea borrowed from the law and

practice of negotiable instruments and the intention is given effect to by recognising endorsement as a transfer. But, apart from such cases, I would

expect an instrument of transfer to be addressed to the assignee. The settlement of accounts containing the entry in *Seetharama Iyer v.*

Narayanasami Pillai [1916] 47 I.C. 749 was between the assignor and assignee and must be regarded as addressed to the assignee. But assuming

that the instrument may be addressed to the debtor, there must be words operating as a transfer.

3. In England, the matter has been complicated by the history of the law relating to the assignment of choses of action. At common law, except in

cases of annuity, a chose in action cannot be assigned at all. The inconvenience of the rule was avoided by permitting the assignee to sue in the

name of the assignor (see reference in foot note (a) to Section 780 of Halsbury,

Vol. IV). The case where the debtor consents and a novation is effected is really not an assignment. But Courts of Equity recognised equitable assignments from the earliest times *Ryall v. Rowles* 1 W. & T.L.C.

98. The assignment may be verbal (Halsbury Volume IV, Section 796). An agreement to assign is enough : see *Tudsbory on Equitable Assignments* pp. 53 and 54 and *Ryall v. Rowles* 1 W. & T.L.C. 111. An agreement may be made out from a course of dealing between the parties. (Halsbury, Vol. IV, Section 796). An order to pay will be enough provided the intention is clear. *W. Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.* [1905] A.C. 454. Then came the Judicature Act, Section 25(6). The Act created no new rights but enabled the assignee to sue in his own name. It has not made assignable contracts which were not assignable in equity before. Nor does it impair the efficacy of equitable assignments which would previously have been valid. (Halsbury Vol. IV, Section 783). Mr. Anantakrishna Iyer also contended that no particular form of assignment under the Statute is required, and relied on Halsbmy, Vol. IV, Section 788 where it is said "'A direction or order by the creditor to pay the amount is sufficient'" and reference is given to *Harding v. Holding* [1886] 17 Q.B.D. 442 and *Brice v. Bannister* [1878] 3 Q.B.D. 569.

In the former (not a case of debt) the assignor George Hardinge writes the instructions to pay at the foot of the account furnished by the trustees. The case is similar to *Rama Iyer v. Venkatachalam Pattar* [1907] 30 Mad. 75 and recognises that before the Judicature Act, it would have been impossible to give a legal title to Laura Hardinge so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity but the legal title could not have been completed in her. Now it can be done. He then points out that the trustees assented to the assignment. It seems to me that the fact carries us a step further and imports into the case another doctrine of equity. Lord Alverstone, C.J., in *Brandt's Son & Co. v. Dunlop Rubber Co.* [1904] 1 K.B. 387 thinks this is the real ground of the decision, a remark not affected by the reversal of the decision by the House of Lords in (1905) A.C 454 as I shall show lower down. In *Brice v. Bannister* [1878] 3 Q.B.D. 569 the only point argued and decided was that there can be a good equitable assignment of a future debt. It is true that Lord Coleridge,

C.J., regarded as a good assignment under the statute, but on appeal, this position was attacked and the counsel for the respondent supported the judgment on the ground that there was good assignment in equity. Cotton, L.J., opened his judgment by saying that there was a good equitable assignment. Brett, L.J., who dissented discusses, the case only on that footing. None of the Lord Justices refers to the statute. This has been pointed out by Chitty, L.J., *Durham Brothers v. Robertson* [1898] 1 Q.B. 765. It is necessary to refer to *Brice v. Bannister* [1878] 3 Q.B.D. 569

Lord Coleridge held that the assignment was within the 25th section, The Court of Appeal decided the case quite apart from the Act. Cotton L.J., expressly decided the case on the ground of equitable assignment. Bramwell, L.J. reluctantly assented to this view, Brett, L.J. dissented but on general principles, So soon as it was ascertained that there was a good equitable assignment with power to give a discharge, it became unnecessary to consider whether it fell within the Act or not. In (1905) A.C. 454 Lord Macnaghten says p. 461) "With the utmost deference to the Court of Appeal, I have great difficulty in following their reasoning, The plaintiff's case was put" in two ways. It was presented as a case within Sub-sec. 6 of Section 25 of the Judicature Act. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately the stress of the argument was laid on the Judicature Act." The Court of Appeal devoted almost the whole of their attention to it. The substantial question, the only question worth considering, was all but ignored. It was treated as subordinate to the question on the statute and bound up with it.

The Lord Chief Justice, with whom the other members of the Court agree says, "I come to the conclusion that this document does not fulfil that which is necessary in order to entitle the plaintiff to sue, on the ground that it is not an absolute assignment or an assignment at all within that section." Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments, or impair their efficacy in the slightest degree. When the rule of equity and the rules of the Common Law conflict, the rules of equity are to prevail. Before the Statute, there was a conflict as regards assignment of debts and other choses in action. At law it was considered necessary that the debtor should

enter into some engagement with the assignee. That was never the rule in equity, In certain cases, the Judicature Act places the assignee in a better position than he was before, Whether the present case falls within the favoured class may be doubted, But, says the Lord Chief Justice ""The document does not, on the face of it purport to be an assignment or use the language of an assignment.

4. Now the Privy Council in *Mulraj v. Viswanath Babhuram Vaidya* [1913] 37 Bom. 198 say ""The error arose from the learned judges not having appreciated that the positive language of the section precluded the application in India of the principles of English Law on which they based their decision.

5. Mr. Ananthakrishna Iyer referred me to *Nandubai v. Gan* [1902] 27 Bom. 150 There Chandavarkar, J., relies on a sentence from Leake on

Contracts 3rd edition, page 1005. The passage also occurs in the 8th edition at page 881, and runs thus : ""But an order for payment out of a debt

accruing due under a contract, as for goods sold, or for work and labour, or the like, is an assignment of a debt which must be stamped as a

transfer of property."" *Buck v. Robson* [1878] 3 Q.B.D. 686 is cited as an authority. On an examination of the case I find that the letter is not an

order of payment but contains express words of assignment. It runs ""I hereby assign to Messrs. R & Son. etc."" It was held that the letter was not

an order for payment of money. The point discussed was that the letter related to a debt that may accrue due in future. The Court following *Brice*

v. Banister [1878] 3 Q.B.D. 569 and differing from *Exparte Shellard*. In *re. Alans* [1873] 17 Eq. 109 Bacon, V.C. held that it was an assignment

and it was admitted to evidence on payment of penalty. I do not think that the case supports the statement in Leake or the decision in the

Nandubai v. Gan [1902] 27 Bom. 150.

6. I may point out that there are other difficulties in the Way of holding Exhibit 1, to be an assignment for the letter Ex. 1 to operate as an equitable

assignment; the fund out of which the payment was to be made should be specified and if no fund is specified, the order does not operate as an

equitable assignment : Halsbury, Vol. IV. Section 801, p. 378 citing *Percival v. Dunn* [1885] 29 Ch. D. 128 where the order was handed over to

the third party as is the ease before me. *Ryall v. Rows* 1 W. & T.L.C. 112 citing

Rodick v. Gandell 43 E.R. 893. But a more formidable difficulty

is that the assignment of a debt must be of the whole debt. It is true that the word "absolute" in the English statute does not occur in the Transfer of

Property Act. But the effect of the word "absolute" is that it should not be by way of charge *Durham Bros. v. Robertson* [1898] 1 Q.B. 765 and

the omission of the word permits an assignment of the debt by way of security *Mulraj Khatan v. Vishwanath* [1913] 37 Bom. 198. see also

Venkatachalam Iyer v. Subramanya Iyer [1912] 11 M.L.T. 245. But the distinction between absolute transfers and transfers by way of security

has nothing to do with the question whether the assignment should be of the whole or may be of a part. In my opinion the assignment of the debt

must be of the whole and cannot be of part. The observation of Chitty, L.J. in *Durham Bros. v. Robertson* [1898] 1 Q.B. 765 are pertinent. "It

does not say of any part of a debt or chose in action. It appears to me, as at present advised, to be questionable whether an assignment of part of

an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of the

action for the debt into as many separate legal causes of action as he might think fit. The right of assignment is not a common law right and is the

creation of the Act and I do not think the Act ought to be construed so as to cause such obvious inconvenience to the debtor." Darling, J.

expresses a similar doubt in *Jones v. Humphreys* [1902] 1 K.B. 10 Lord Alverston, C.J., uses words to the same effect in *William Brandts Sons*

& Co. v. *Dunlop Rubber Co. Ltd.* [1904] 1 K.B. 387 and the reversal by the House of Lords in *William Brandts Sons & Co. v. Dunlop Rubber*

Co. Ltd. [1905] A.C. 454 does not affect this portion of the Lord Chief Justice's judgment. The different opinion of Darling, J. in (1902) 1 K.B.

14 does not convince me, the decision being reversed by the Court of Appeal (on another point) as the reasons given do not meet the difficulties

pointed out by Chitty, L.J. in *Durham Bros. v. Robertson* [1898] 1 Q.B. 765. He deduces his conclusions from the fact that a future debt may be

assigned. In *Subjan Sahib v. Abdul Aziz Sahib* [1917] 42 I.C. 684 Seshagiri Iyer, J., makes an observation that the omission of the word

absolute" is used in contrast to "by way of security" and has nothing to do with the point now raised. An assignment may be of the whole debt by

way of security and though when the security is worked out, a part only may suffice. There may be a series of assignments each of the whole debt

by way of security. The assignees will then be in the position of a number of mortgagees. I am therefore of opinion for all these reasons, that Exhibit

I is not an assignment or a valid assignment. The appeal fails and is dismissed with costs of respondents 1 to 4 (plaintiffs).